Supreme Court, U.S.
FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1809

SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1985

MILLER CURTAIN COMPANY,
INC. PETITIONER

V.

AMALIA C. RUIZ RESPONDENT

ON APPEAL TO THE
SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

HARRIS & PADGETT
Incorporated
1200 South Texas Building
San Antonio, Texas 78205
(512) 224-4046

J. Joe Harris
Shelton E. Padgett

COUNSEL OF RECORD FOR
PETITIONER MILLER CURTAIN
COMPANY, INC.

42 pp

QUESTION PRESENTED FOR REVIEW

Whether the National Labor Relations Act[1] (hereinafter "the NLRA") pre-empts a state cause of action alleging discriminatory discharge in retaliation for an individual non-union employee filing a claim for workmen's compensation benefits?

---

1. 49 Stat. 449 (1935), as amended by 61 Stat. 136 (1947), 65 Stat. 601 (1951), 72 Stat. 945 (1958), 73 Stat. 541 (1959), 88 Stat. 395 (1974); 29 U.S.C. §§151-169.

LIST OF PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to this proceeding: Miller Curtain Company, Inc. (hereinafter "Petitioner" and/or "Miller Curtain") and Amalia C. Ruiz (hereinafter "Respondent" and/or "Ruiz").

TABLE OF CONTENTS

Page

Question Presented for Review i

List of Parties to the Proceeding.... ii

Table of Contents..... iii,iv

Table of Authorities ..... v,vi,vii,viii

Opinions Below 1

Jurisdiction 1

Constitutional Provision and Statutes Involved 3

Statement of the Case 5

Argument and Authorities 9

A. The Pre-Emption Doctrine 9

B. Pre-Emption and the NLRA ... 10

C. The Garmon Doctrine 14

D. The Board's Determination .. 19

E. Employment Discrimination Actions Pre-Empted 23

F. Actual or Arguable Conduct Pre-Empted 25

G. Concerted Activity..... 27

Conclusion 29

Certificate of Service 30

Appendicies

1. Texas Supreme Court decision in Ruiz v. Miller Curtain Company, Inc. ..... A

2 Court of Appeals decision in Ruiz v. Miller Curtain Company, Inc. ..... B

3. 57th Judicial District Court's Order C

4. Petitioner's Motion to Dismiss for Lack of Jurisdiction ..... D

5. Petitioner's Motion for Rehearing ..... E

6. Texas Supreme Court's Denial of Motion for Rehearing ..... F

TABLE OF AUTHORITIES

Court Cases **Page**

Allis-Chalmers v. Lueck, 105 S.Ct. 1904 (1985) 2,3,26

Association of Machinist v. Gonzales, 356 U.S. 617, 619 (1958) 13

Automobile Workers v. Russell, 356 U.S. 634 (1958) 18

Auto Workers v. Wisconsin, 351 U.S. 266 (1956)..... 18,19

Belknap, Inc. v. Hale, 463 U.S. 491 (1983) 13,14

Ewing v. NLRB, 768 F.2d 51 (2nd Cir. 1985) 3,29

Farmer v. Carpenters, 430 U.S. 290 (1977) 2,3,23

Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141, 152-153 10

Garner v. Teamsters Union, 346 U.S. 485, 490-491 (1953) 11,12

Gibbons v. Ogden, 9 Wheat. 1 (1982) 9

Guss v. Utah Board, 353 U.S. 1 (1957) 11,16

International Machinist v. Gonzales, 356 U.S. 617 (1958) 18

Kelly v. Washington, 302 U.S. 1, 9 (1937) 10

Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980) 8,20

Linn v. Plant Guard Workers, 383 U.S. 53 (1966) 17

NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984) 3,20,27,28

NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) 14

Peabody-Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) 25

Prill v.NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. denied, 54 USLW 3310 (November 4, 1985) 3,28

Puchert v. Agsalud, 677 P.2d 449 (Ha. 1984),appeal dism'd sub. nom. 105 S.Ct. 2693 (1985) 25

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) ..... in passim

Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978) 19

Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511 (7th Cir. 1985) 3,26

Weber v. Anheuser-Busch, 348 U.S. 468 (1955) 24

Board Cases **Page**

Bay State Gas Co., 255 NLRB 705, 106 LRRM 1385 (1981) 22

E.I. DuPont v. De Nemours & Co. Inc., 257 NLRB 137, 107 LRRM 1475 (1981) 22

Krispy Kreme Doughnut Corp, 245 NLRB 1053, 102 LRRM 1492 (1979) 19

Ohio Brass Co., 261 NLRB 19, 110 LRRM 1009 (1982) 22

Welfare Pension & Vacation Funds 256 NLRB 145, 107 LRRM 1430 (1981) 22

Other Authority **Page**

National Labor Relations Board, 44th Annual Report (1979) 22

TABLE OF AUTHORITIES

Constitution, Statutes, and Rules	Page
Article VI, Clause 2	3,4
29 U.S.C. §§157 and 158	in passim
29 U.S.C. §185	17
29 U.S.C. §187	17
28 U.S.C. §1257(3)	2
28 U.S.C. §2101(c)	2
U.S. Sup. Ct. Rule 20.4	2
U.S. Sup. Ct. Rule 17.1(b) and (c)	3
Article 8307c, Tex. Rev. Civ. Stat.	in passim

OPINIONS BELOW

The opinion of the Texas Supreme Court is reported at 702 S.W.2d 183 (Tex. 1985). (Appendix "A"). The opinion of the Court of Appeals for the Fourth Supreme Judicial District of Texas is reported at 686 S.W.2d 671. (Appendix "B"). The order of the 57th Judicial District Court of Bexar County, Texas, is not reported. (Appendix "C").

JURISDICTION

This is an action alleging discriminatory discharge in retaliation for filing a claim for workmen's compensation benefits in violation of Article 8307c, Tex. Rev. Civ. Stat., wherein Petitioner alleges that Respondent's actions constitute

"concerted activity" within the meaning of the NLRA, and, thus, the state cause of action is pre-empted. Petitioner's position was upheld by the trial court and the intermediate appellate court. The Texas Supreme Court issued an opinion on December 11, 1985, reversing the lower courts. Petitioner's Motion for Rehearing (Appendix "E") was denied on February 5, 1986. (Appendix "F").

The jurisdiction of this Court is invoked pursuant under 28 U.S.C. §1257(3). Decisions of this Court involving the pre-emption of state causes of action by the NLRA have traditionally been reviewed by writ of certiorari. See, e.g., San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Farmer v. Carpenters, 430 U.S. 290 (1977); and Allis-Chalmers v. Lueck, 105 S.Ct. 1904 (1985). This petition is timely pursuant to 28 U.S.C. 2101(c) and Supreme Court Rule 20.4.

In connection with Supreme Court Rule 17.1(b) and (c), the decision of the Texas Supreme Court conflicts with the following decisions of this Court and those of federal court's of appeal listed below:

(1) San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959);

(2) Farmer v. Carpenters, 430 U.S. 290 (1977);

(3) NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984);

(4) Allis-Chalmers v. Lueck, 105 S.Ct. 1904 (1985);

(5) Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. denied, 54 USLW 3310 (November 4, 1985);

(6) Ewing v. NLRB, 768 F.2d 51 (2nd Cir. 1985); and,

(7) Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511 (7th Cir. 1985).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Constitutional provision involved is Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The federal statutory provisions involved are Sections 7 and 8(a)(1) of the NLRA:

> Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .
>
> Section 8(a)(1). It shall be an unfair labor practice for an employer - (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7;

The state statutory provision involved is Article 8307c:

Protection of claimants from discrimination by employers; remedies; jurisdiction:

Section 1: No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

Section 2: A person who violates any provisions of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be on the employee.

Section 3: The district courts of the State of Texas shall have jurisdiction, for cause shown to restrain violations of this Act.

STATEMENT OF THE CASE

Ruiz commenced this action on February 4, 1982, alleging that she was discriminatorily discharged by Miller

Curtain in retaliation for her filing a claim for workmen's compensation benefits. Miller Curtain removed this action to federal court under 42 U.S.C. §§1441(b) and 1443, as Ruiz had also asserted a federal claim under 42 U.S.C. §1985. Following jury selection, trial commenced in federal court on May 9, 1983. During presentation of Ruiz' evidence on liability on May 10, 1983, the federal court dismissed the federal claim and remanded the state claim to state court.

Following remand, Miller Curtain filed a Motion to Dismiss (Appendix "D") on July 8, 1983, premised upon NLRA pre-emption of the claim asserted under Article 8307c. The parties stipulated there were no material factual disputes and that the issue before the trial court was purely a matter of law. On July 14, 1983, the trial court granted Miller Curtain's Motion. (Appendix C).

Ruiz thereafter perfected an appeal to the state intermediate appellate court which issued an unanimous opinion on February 6, 1985, affirming the trial court:

> The appeal of this judgment raises the question for the first time in Texas whether a worker's cause of action for wrongful discharge under article 8307c against an employer engaged in a business affecting interstate commerce is pre-empted by sections 7, 29 U.S.C. §157 (1982) and 8, 29 U.S.C. §158 (1982) of the NLRA. We conclude that the conduct at issue in the case before us is arguably prohibited by the NLRA and hence within the exclusive jurisdiction of the National Labor Relations Board (NLRB).

(Appendix "B", p. 3).

On December 11, 1985, the Texas Supreme Court reversed, holding:

> For the 8307c cause of action to be pre-empted, the filing of a worker's compensation claim must be at least "arguably" protected by the NLRA under Garmon. Sections 7 and 8 of the NLRA protect a worker's right to engage in self-organization, to bargain collectively, and to engage in "other concerted activities" for the purpose of collective bargaining or other mutual aid or protection. Amalia Ruiz was not in a labor union and no collective bargaining agreement existed. Thus, the only way her state claim can be pre-empted by the NLRA is if the Texas statute attempts to protect the kind of "concerted activity" referred to in section 7. **We hold that filing a claim for workers' compensation benefits does not constitute the type of "concerted activity" contemplated by the NLRA.** Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980). Therefore, Ruiz' cause of action under article 8307c is not pre-empted by federal law.

(Appendix "A", p. 3). (Emphasis added).

The Texas Supreme Court further held that "[e]ven if the concept of 'concerted activity' could be so broadly construed as to encompass an individual employee's

worker's compensation claim, the 8307c cause of action would not fall under the pre-emption doctrine. **This action taken by Ruiz which the state statute protects is neither actually nor arguably subject to the NLRA."** Id. (Emphasis added).

ARGUMENT AND AUTHORITIES

A. The Pre-Emption Doctrine

The Pre-Emption Doctrine is a firmly embedded principle of federalism which was set forth by the Framers in the Supremacy Clause of the Constitution. Article VI, Cl. 2., United States Constitution. See, Gibbons v. Ogden, 9 Wheat. 1 (1892). In keeping with the Framer's intent, and the explicit language of the Supremacy Clause, this Court has carefully guarded against any erosion of this vital constitutional principle. "If a congressional enactment occupies the field, its control by the Supremacy Clause supersedes or, in the

current phrase, pre-empts state power." Kelly v. Washington, 302 U.S. 1, 9 (1937).

Whether a state cause of action is pre-empted by a federal law is not subject to a talismanic test. Thus, in deciding whether a federal law pre-empts the state claim, this Court has held that one must ascertain Congress' intent. "Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141, 152-153 (1982).

B. Pre-Emption and the NLRA

In the NLRA, "Congress has entrusted administration of the labor policy for the nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." San Diego

Building Trades Council v. Garmon, 359 U.S. 236, 242 (1959). Indeed, "Congress meant to reach to the full extent of its power under the Commerce Clause" when it enacted the NLRA. Guss v. Utah Board, 353 U.S. 1, 3 (1957).

Moreover, the importance of the National Labor Relations Board (hereinafter "the Board") as a specialized tribunal in the area of employee-employer relations has long been recognized.

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these

> diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting ajudications as are different rules of substantive law.

Garner v. Teamsters Union, 346 U.S. 485, 490-491 (1953).

Although Congress endeavored to cover most employer/employee disputes when it enacted the NLRA, it did not exhaust the full sweep of its legislative powers over industrial relations in every area with complete clarity. As noted in Weber v. Anheuser-Busch, 348 U.S. 468 (1955):

> . . . the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimination by fixed metes and bounds. * * * This penumbral area can be rendered progressively clear only by the course of litigation.

348 U.S. 468, 480-481. See, also: Association of Machinist v. Gonzales, 356 U.S. 617, 619 (1958). ("The statutory implications concerning what has been taken from the states and what has been left to them are of a Delphic nature to be translated into concreteness by the process of litigation elucidation").

In determining whether a state claim has been pre-empted by the NLRA, this Court summarized in Belknap, Inc. v. Hale, 463 U.S. 491 (1983), the two applicable doctrines:

> Under the first, set out in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), state regulations and causes of action are presumptively pre-empted if they concern conduct that is or arguably either prohibited or protected by the Act. Id., at 245. * * * The second pre-emption doctrine, set out in Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976), proscribes state regulation and state-law causes of action concerning conduct that Congress intended to be

> unregulated, Id., at 140, conduct that was to remain a part of the self-help remedies left to the combatants in labor disputes, Id, at 147-148.

463 U.S. 491, 498-499.

It is undisputed that Ruiz was not engaged in union activities, nor is there a union representing any of Miller Curtain's employees. However, it is well established that the discharge of an employee acting in concert for mutual aid or protection is an unfair labor practice under the NLRA, even though no union or union activity is involved. NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

C. The Garmon Doctine

In San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), this Court set forth the test to be applied to those situations where a state statute such as Article 8307c purports to regulate an activity or conduct protected by Section

7, or constitutes an unfair labor practice under Section 8.

> Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes. * * * **When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to adverted.**

359 U.S. 236, 244-45. (Emphasis added).

In applying the Garmon formulation, this Court has noted that, "It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner." Id., 359 U.S. 236, 245. Thus, this Court has held state causes of action pre-empted even when the Board refuses to exercise its statutory jurisdiction.

> We are told by appellee that to deny the state jurisdiction here will create a vast no-man's-land, subject to regulation by no agency or court. We are told by appellant that to grant jurisdiction would produce confusion and conflicts with federal policy. Unfortunately, both may be right. We believe, however, that Congress has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's-land.

Guss v. Utah Board, 353 U.S. 1 (1957).

There are only three classes of actions excepted from pre-emption under Garmon, none of which is present here: (1) those expressly created in the NLRA by Congress; (2) where the activity regulated by the states is of peripheral concern to the NLRA; and, (3) where the activity touches interests so deeply rooted in local feeling and responsibility that, absent compelling congressional

direction, the Court will not infer that Congress has deprived the states of the power to act.

The NLRA creates two exceptions to the Garmon doctrine. Section 303 expressly permits anyone injured by a violation of Section 8(b)(4) to recover damages in federal court even though such unfair labor practices are remediable by the Board. 29 U.S.C. §187. Section 301 allows actions for breach of a collective bargaining agreement regardless of whether the breach is also an unfair labor practice within the exclusive jurisdiction of the Board. 29 U.S.C. §185.

Regulated state activity of peripheral concern to the NLRA, is also excepted from pre-emption under Garmon. Id., at 243. See, e.g., Linn v. Plant Guard Workers, 383 U.S. 53 (1966) (civil action for malicious libel during an organizing campaign not pre-empted where

NLRA provides no remedy); and, International Machinist v. Gonzales, 356 U.S. 617 (1958) (civil action by employee for restoration of union status not pre-empted where NLRA provides no remedy). As demonstrated infra, the NLRA provides a remedy for the instant action which has been recognized and enforced by the Board.

Lastly, this Court has held that where a state activity touches interests so deeply rooted in local feeling and concern, absent compelling congressional direction, no inference will be made that Congress has deprived the states of the power to act. Garmon at 244. These cases traditionally involve violence, or the actual threat thereof, where the police power of the state is invoked to protect the safety of the public. See, e.g., Automobile Workers v. Russell, 356 U.S. 634 (1958) (mass picketing and threats of violence); Auto Workers v. Wisconsin, 351

U.S. 266 (1956) (mass picketing and violence); and Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978) (state trespass statutes).

This Court has expressly left the determination of whether conduct is protected, and thus pre-empted, to the discretion of the Board.

> Where applicable the Garmon doctrine completely pre-empts state court jurisdiction unless the Board determines that the disputed conduct is neither protected nor prohibited by the Federal Act.

Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 fn. 29 (1978).

D. The Board's Determination

In Krispy Kreme Doughnut Corp., 245 NLRB 1053, 102 LRRM 1492 (1979), the Board held that the act of filing a workmen's compensation claim, and the benefits derived therefrom by an individual employee, "arise out of the employment relationship and are of common interest

to other employees"; and, furthermore, that an employer's attempt to deny an individual employee, and by way of example other employees, access to workmen's compensation benefits by discriminatory actions such as discharge, are per se violations of Section 8(a)(1) of the NLRA.

The Fourth Circuit denied enforcement of the Board's decision in Krispy Kreme, 635 F.2d 304 (4th Cir. 1980), based upon its narrow reading of "concerted activities" as requiring the conduct of two or more employees in concert with each other. Although the Texas Supreme Court relied upon the Fourth Circuit's limited reading to hold that the filing of a workmen's compensation claim did constitute "concerted activity," this narrow construction of Sections 7 and 8 was expressly rejected by this Court in NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984) (see, fn. 4 expressly

rejecting Fourth Circuit's decision in Krispy Kreme):

> It is possible . . . for an employer to commit an unfair labor practice by discharging an employee who is not himself involved in concerted activity, but whose actions are related to other employee's concerted activities in such manner as to render his discharge an interference or restraint on those activities.

465 U.S. 822, 833, fn. 10.

The significance of the Board's decision in Krispy Kreme to assert jurisdiction under Section 8 of the NLRA over state claims such as the one alleged herein under Article 8307c, was expressed in the Board's 44th Annual Report.

> In Krispy Kreme Doughnut Corp., the Board unanimously held that the employer violated Section 8(a)(1) of the Act when it discharged an employee because of his expressed intent to file a workmen's compensation claim. In so doing, the Board relied on Self Cycle & Marine Distributor Co., where the discharge of an employee for pursuing an unemployment compensation claim was held

> unlawful. In the Board's view, such types of activity are protected because both workmen's compensation and unemployment benefits arise out of the employment relationship, they are common interest to other employees, and the affected employees in both cases were discharged for opposing their respective employers attempt to deny both them and their fellow employees access to such benefits.

44th ANNUAL REPORT (1979) at p. 86.

The Board's decision to assert its jurisdiction over the per se conduct such as that proscribed in Article 8307c has been confirmed in its decisions following Krispy Kreme. See, e.g., Ohio Brass Co., 261 NLRB 19, 110 LRRM 1009 (1982); E.I. DuPont v. De Nemours & Co., Inc., 257 NLRB 137, 107 LRRM 1475 (1981); Welfare Pension & Vacation Funds, 256 NLRB 145, 107 LRRM 1430 (1981); and Bay State Gas Co., 255 NLRB 705, 106 LRRM 1385 (1981).

E. Employment Discrimination Actions Pre-empted

In Farmer v. Carpenter, 430 U.S. 290 (1977), this Court held that the tort of intentional infliction of emotional distress was not pre-empted by the NLRA. In so holding, this Court emphasized that "[n]o provision of the National Labor Relations Act protects the 'outrageous conduct' complained of" as a basis for the unapplicability of the pre-emption axiom. Significantly, this Court noted:

> . . . we reiterate that concurrent state court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme. **Union discrimination in employment opportunities cannot itself form the underlying "outrageous" conduct on which the state court tort action is based; to hold otherwise would undermine the pre-emption principle.** Nor can threats of such discrimination suffice to sustain state court jurisdiction. * * * **Simply stated, it is essential that the state tort be either unrelated**

> **to employment discrimination or a function of the particulary abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual threatened discrimination itself.**

430 U.S. 290, 304-305. (Emphasis added). Because of the "risk that the jury verdict represented damages for **employment discrimination** rather than for instances of intentional infliction of emotional distress," this Court remanded the case for retrial with proper jury instructions that employment discrimination not be considered.

On its face, Article 8307c states that **employer discrimination** in employment opportunities **is the cause of action** - - absent evidence of such a Plaintiff would not be entitled to judgment. Further, damages under Article 8307c are limited to the employment discrimination. Thus, Article 8307c is

pre-empted because on its face it conflicts with the holding in Farmers, that ". . . discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state court tort action is based." 430 U.S. 290, 304.

F. Actual or Arguable Conduct Pre-Empted

Relying on Peabody-Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) and Puchert v. Agsalud, 677 P.2d 449 (Ha. 1984), appeal dism'd sub. nom., 105 S.Ct. 2693 (1985), the Texas Supreme Court held as a matter of law the conduct complained of by Ruiz was neither "actually or arguably subject to [regulation] by the NLRA" (Appendix "A", p. 3). Both of the aforementioned cases involved collective bargaining agreements. Id. at 1323 and 458-459, respectively. Of course, each of those cases was decided prior to this Court's

recent decision in Allis-Chalmers v. Lueck, 105 S.Ct. 1904, (1985), holding that a state tort cause of action for bad-faith delay in making disability-benefit payments was pre-empted by Section 301 of the NLRA.

Following this Court's decision in Allis-Chalmers, the Seventh Circuit held in Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511 (7th Cir. 1985) that a state action alleging retaliatory discharge for the filing of a workman's compensation claim is also pre-empted by Section 301 of the NLRA.

Peabody and Puckert have been overruled sub silentio by Allis-Chalmers. The Texas Supreme Court's reliance upon Peabody and Puckert is misplaced, and in direct conflict with decisions of this Court.

G. Concerted Activity

As previously noted, the Texas Supreme Court also held that the filing of a workman's compensation claim does not constitute "concerted activity" within the meaning of the NLRA (Appendix A, p. 3). This conclusion directly conflicts with this Court's recent decision in NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984), holding that Section 7 may encompass a single employee's concern. Indeed, in holding that an individual employee's safety concerns constitute "concerted activity," this Court, speaking through Justice Brennan, said:

> Although one could interpret the phrase, "to engage in concerted activities," to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of §7 does not confine itself to such a narrow meaning. In fact, §7 itself defines both joining and

> assisting labor organizations - activities in which a single employee can engage - as concerted activities (footnote omitted).

Id. at 831.

Moreover, when the Board recently attempted to preclude concerted activity protection as applied to a single employee, the Court of Appeals for the District of Columbia unequivocably rejected this interpretation. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. denied, 54 U.S.L.W. 3310 (November 4, 1985). (also referred to by its style before the Board, "Meyers Industries"). The Second Circuit has also rejected this interpretation of concerted activity in a case involving an individual employee filing a safety complaint with the Occupational Safety & Health Administration Act.

> **Under the Meyers rule the Board has upheld retaliatory discharges arising from individual employee action taken in accordance with laws governing worker safety, workers' compensation, unemployment benefits, and wage and hour standards.** The Board has applied its new test to a general personnel rule prohibiting such individual action. (cite omitted) * * * **We can not agree that the Meyers rule or a literal reading of the word "concerted" is required by the Act.** The Board cannot claim that its literal compliance with the "letter of the law" excuses its avoidance of the policies addressed by that law.

Ewing v. NLRB, 768 F.2d 51, 53-54 (2nd Cir. 1985).

CONCLUSION

For the reasons stated above, Miller Curtain submits that the Petition for Writ of Certiorari brings before this Court substantial and important federal-state questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Accordingly, Miller Curtain respectfully prays that this Court grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

HARRIS & PADGETT
Incorporated
1200 South Texas Building
San Antonio, Texas 78205
(512) 224-4046

J. Joe Harris

Shelton E. Padgett

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was delivered by Certified Mail, Return Receipt Requested to: Mr. Rodolfo R. Munoz 126 Main Plaza, Suite 1, San Antonio, Texas 78205 on this the 1st day of May, 1985.

Shelton E. Padgett

IN THE SUPREME COURT OF TEXAS

NO. C-4064

AMALIA C. RUIZ,	§	
	§	
Petitioner	§	
	§	
v.	§	From Bexar County
	§	
MILLER CURTAIN COMPANY, INC.,	§	Fourth District
	§	
	§	
Respondent	§	

Amalia Ruiz was fired from her job at Miller Curtain Company after filing a claim for workers' compensation. Ruiz then sued Miller Curtain for wrongful discharge under article 8307c, Tex. Rev. Civ. Stat. Ann. Article 8307c prohibits an employer from firing an employee in retaliation for filing a claim for

workers' compensation.[1] Ruiz also alleged her termination was a violation of her civil rights under 42 U.S.C. §1985 (1982).

---

1. Article 8307 provides:

> Protection of claimants from discrimination by employers; remedies; jurisdiction
>
> Section 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.
>
> Sec. 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.
>
> Sec. 3. The district courts of the State of Texas shall have jurisdiction, for cause shown, to restrain violations of this Act.

Miller Curtain removed the case to federal court. The federal court dismissed the section 1985 complaint for lack of a factual or legal basis and remanded the cause to the state court for disposition of the article 8307c claim.

In the state court Miller Curtain moved to dismiss the cause for want of jurisdiction, asserting Ruiz' article 8307c cause of action is preempted by the National Labor Relations Act (NLRA). The trial court granted the motion to dismiss and rendered judgment that Ruiz take nothing. The court of appeals affirmed the trial court's judgment. 686 S.W.2d 671. We reverse the judgment of the court of appeals.

The issue before this court is whether an employee's state cause of action for wrongful discharge against an employer doing business in interstate commerce is preempted by sections 7 and 8

of the NLRA. 29 U.S.C. §§157 and 158 (1982). It is undisputed that Miller Curtain conducts business affecting interstate commerce and is therefore subject to regulation under the NLRA. Section 7 of the NLRA provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities . . .

29 U.S.C. §157 (1982). Section 8 of the NLRA provides in part:

> (a) It shall be an unfair labor practice for an employer -
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . .

Id. §158(a)(1). Ruiz was not a member of a labor union during her employment at Miller Curtain, nor were Miller Curtain and its employees parties to any kind of collective bargaining agreement.

The preemption doctrine originated from the Supremacy Clause of the United States Constitution, article VI. The clause mandates that federal law occupying a particular area will supercede or preempt state regulation in that area. Kelly v. Washington, 302 U.S. 1 (1937). There is no precise formula to determine whether the state's regulation has been preempted. Weber v. Anheuser Busch, 348 U.S. 468 (1955).

In determining whether a state cause of action is preempted by federal regulation under the NLRA, the United States Supreme Court stated, "State regulations and causes of action are presumptively preempted if they concern

conduct that is actually or arguably either prohibited or protected by the Act." San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). However, the court added, the State regulation may be sustained if the conduct regulated is "of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility." Id. at 236. This has become known as the Garmon doctrine.

For the 8307c cause of action to be preempted, the filing of a worker's compensation claim must be at least "arguably" protected by the NLRA under Garmon. Sections 7 and 8 of the NLRA protect a worker's right to engage in self-organization, to bargain collectively, and to engage in "other concerted activities" for the purpose of collective bargaining or other mutual aid or protection. Amalia Ruiz was not in a labor

union and no collective bargaining agreement existed. Thus, the only way her state claim can be preempted by the NLRA is if the Texas statute attempts to protect the kind of "concerted activity" referred to in section 7. We hold that filing a claim for workers' compensation benefits does not constitute the type of "concerted activity" contemplated by the NLRA. Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980). Therefore, Ruiz' cause of action under article 8307c is not preempted by federal law.

Even if the concept of "concerted activity" could be so broadly construed as to encompass an individual employee's workers' compensation claim, the 8307c cause of action would not fall under the preemption doctrine. The action taken by Ruiz which the state statute protects is neither actually nor arguably subject to the NLRA.

"The Supreme Court has discouraged the inflexible application of the Garmon doctrine, especially where the state has a substantial interest in regulation of the conduct at issue and the state's interest is one that does not threaten undue interference with the federal regulatory scheme." Peabody-Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) (citing Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977)).

Furthermore, the court has recognized exceptions to the Garmon preemption rule. A state statute otherwise within the scope of Garmon will not be preempted if the conduct it attempts to regulate is merely a peripheral concern of the NLRA, nor will preemption occur if the statute touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be

inferred that Congress has deprived the states of the power to act. Peabody-Galion, 666 F.2d at 1317 (citing Garmon, 359 U.S. at 243-44).

Article 8307c is intended to protect the state scheme of workmens' compensation. The states have traditionally enacted and regulated their own respective workers' compensation systems. Nothing in the NLRA or other federal legislation indicates that Congress has taken away the states' Tenth Amendment power to regulate in this area. "Workmen's compensation is preeminently a matter of state concern." Peabody-Galion, 666 F.2d at 1317. The state statutes designed to further the workers' compensation system touch interests deeply rooted in local feeling and responsibility. Absent compelling congressional direction we cannot infer

that Congress has deprived the states of the power to act in this area.

Moreover, the conduct regulated by article 8307c is at most a merely peripheral concern of the NLRA. The central purpose of the NLRA is to promote the organization of unions and to provide unions with an atmosphere of freedom to organize and bargain collectively. Id. at 1313. The Texas workers' compensation system has nothing to do with union activity or collective bargaining. We see very little likelihood that the Texas scheme will interfere with the policies or workings of the federal statute.

The United States Court of Appeals for the 10th Circuit dealt with the question of NLRA preemption of an Oklahoma statute similar to 8307c. Id. at 1313. However, the plaintiff in that case was a union member and the union was bound by a collective bargaining agreement.

Nevertheless, the 10th Circuit held the employee's state cause of action for retaliatory discharge, sounding in tort, was not preempted by the federal labor statute. The court stated, "It is inconceivable that there would be state court interference with federal labor policy in connection wth the present type of statute." 666 F.2d at 1316. The court further concluded that even where a minor aspect of a state cause of action is at least arguably within the regulatory jurisdiction of the NLRB, the Garmon rule is not to be read to require preemption.

> The Oklahoma statute . . . undertakes to regulate conduct that is purely local in its character. It seeks to remedy discharges that are imposed as sanctions against state workers who are claiming workmen's compensation. Actions for damages brought pursuant to the Oklahoma statute are not unlike other state law tort actions sustained by the Supreme Court as exceptions to the preemption doctrine. Cf. Farmer, supra (intentional infliction of

emotional distress); Linn v. Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) (libel).

Peabody-Galion, 666 F.2d at 1317-18.

In a factually similar case, the Supreme Court of Hawaii held that a state statute prohibiting unlawful discharges for injuries compensable under workers' compensation was not preempted because those statutes are of only peripheral concern to federal labor laws. Puchart v. Agsalud, 677 P.2d 449 (1984), appeal dism'd sub nom. Pam American World Airways, Inc. v. Puchert, 105 S.Ct. 2693 (1985). "The state has a substantial interest in the welfare of workers who are injured in the course of their employment and to see that they are not penalized for pursuing remedies granted to them by statute," Puchert, 677 P.2d at 456. The United States Supreme Court dismissed the appeal in Puchert because no substantial

federal question was presented. 105 S.Ct. 2693 (1985). As did Peabody-Galion, Puchert involved a union employee and a collective bargaining agreement, making the case for preemption stronger than in this case. Other jurisdictions which have considered this issue are in accord. See, e.g., Vaughn v. Pacific Northwest Bell Telephone Co., 40 Or. App. 427, 595 P.2d 829 (1979), aff'd, 289 Or. 73, 611 P.2d 281 (1980); Judson Steel Corp. v. Workers' Compensation Appeals Board, 22 Cal. 3d 658, 586 P.2d 564, 150 Cal. Rptr. 250 (1978).

The doctrine of federal preemption does not apply. We reverse the judgment of the court of appeals and remand the cause to the trial court for trial on the merits.

Robert M. Campbell
Justice

OPINION DELIVERED: December 11, 1985.

NO. C-4064

AMALIA C. RUIZ	§	
	§	
Petitioner	§	
	§	
vs.	§	Bexar County,
	§	Fourth District
MILLER CURTAIN COMPANY, INC.	§	
	§	
Respondent	§	

This cause was heard on writ of error from the Court of Appeals for the Fourth Supreme Judicial District. The original transcript and the transcript showing the proceedings in the court of appeals were considered.

It is the opinion of the court (Justice Robert M. Campbell, author) there is error in the judgment of the court of appeals which affirmed the trial court's judgment. The trial court rendered judgment that Amalia C. Ruiz take nothing.

In accordance with the opinion of this court, it is ordered that:

1) as Tex. Rev. Civ. Stat. Ann. Article 8307 is not preempted by the National Labor Relations Act, the judgment of the court of appeals is reversed.

2) The cause is remanded to the trial court for trial on the merits.

3) Miller Curtain Company, Inc. shall pay the costs in this court and the court of appeals.

4) Amalia C. Ruiz shall recover her costs in those courts from Miller Curtain Company, Inc.

A copy of this judgment with a copy of the opinion shall be certified to the District Court of Bexar County, Texas for observance.

(Opinion by Justice Campbell)

Court of Appeals
Fourth Supreme Judicial District
of Texas
San Antonio

OPINION

Appeal No. 04-83-00435-CV

Amalia RUIZ,
Appellant

v.

MILLER CURTAIN COMPANY, INC.,
Appellee

Appeal from the 57th District Court
of Bexar County

Trial Court No. 82-CI-01808
Honorable Robert R. Murray,
Judge Presiding

Opinion By: Rudy Esquivel, Assoc. Justice

Sitting: Rudy Esquivel, Associate Justice
Pete Tijerina, Associate Justice
Preston H. Dial, Jr., Associate Justice

Delivered and Filed: February 6, 1985

AFFIRMED.

This is an appeal from a judgment in a worker's compensation case granting a motion to dismiss for want of jurisdiction on the ground that the employee's cause

of action for wrongful discharge under the non-discrimination provisions of TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1985), was preempted by the National Labor Relations Act.[1]

This litigation began with a dispute between appellant Amalia C. Ruiz (Ruiz) and her employer, appellee Miller Curtain Company, Inc. (Miller Curtain), a business concern undisputably engaged in a business affecting interstate commerce. On February 4, 1982, Ruiz sued Miller Curtain in the 57th Judicial District Court of Bexar County, Texas, alleging she was wrongfully discharged by Miller Curtain because she commenced proceedings under

---

1. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§151-169 (1982)). Although reference is made to sections of the Act, citation will also be made to the corresponding United States Code section for ease of reference.

the Texas Worker's Compensation Act for injuries occurring on the job; Ruiz also asserted a claim for relief for interfering with her civil rights pursuant to 42 U.S.C. §1985 (1982). Miller Curtain's motion to remove the cause to federal court was granted and trial was had to a jury in the United States District Court for the Western District of Texas. The trial judge, H. F. Garcia, U.S. District Judge, concluded that there was no factual or legal basis for the federal claim asserted under section 1985 and dismissed it, remanding the remaining cause of action under article 8307c to the 57th Judicial District Court for further proceedings and disposition. In state court, Miller Curtain filed its motion to dismiss for want of jurisdiction and the trial judge entered judgment granting the motion premised upon the preemption of Ruiz's cause of action by the NLRA and

that Ruiz take nothing. The appeal of this judgment raises the question for the first time in Texas whether a worker's cause of action for wrongful discharge under article 8307c against an employer engaged in a business affecting interstate commerce is preempted by sections 7, 29 U.S.C. §157 (1982) and 8, 29 U.S.C. §158 (1982), of the NLRA. We conclude that the conduct at issue in the case before us is arguably prohibited by the NLRA and hence within the exclusive jurisdiction of the National Labor Relations Board (NLRB). We affirm the judgment of the trial court.

Article 8307c provides as follows:

> Protection of claimants from discrimination by employers; remedies; jurisdiction
>
> Section 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the

> Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.
>
> Sec. 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.
>
> Sec. 3. The district courts of the State of Texas shall have jurisdiction, for cause shown, to restrain violations of this Act.

TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1985).

It is undisputed that Miller Curtain was at all times material herein a business having interstate aspects that subject it to regulation under the NLRA. The sections of the NLRA pertinent to this appeal are sections 7, 29 U.S.C. §157 (1982) and 8, 29 U.S.C. §158 (1982). These broad provisions govern both protected

"concerted activities" and "unfair labor practices."

Section 7 of the NLRA, 29 U.S.C. §157 (1982), provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

29 U.S.C. §157 (1982).

The provisions of section 8 of the NLRA, 29 U.S.C. §158 (1982), relevant to these proceedings are as follows:

> (a) It shall be an unfair labor practice for an employer -
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . .

* * * *

Id. §158(a)(1).

The federal preemption doctrine is clearly set out in the supremacy clause of the Constitution. U.S. CONST. art. VI, cl. 2. Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Fidelity Federal Savings & Loan Association v. De La Cuesta, 458 U.S. 141, 154, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664, 676 (1982). Thus, in deciding whether a federal law preempts a state statute, the intent of Congress in enacting the federal statute at issue must be ascertained. The United States Supreme Court very clearly set out the intent of Congress in enacting the NLRA. In San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) (where Court

held cause of action for damages resulting from peaceful picketing under certain California statutes preempted by sections 7 and 8), the Court stated the following:

> Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience:
>
> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specifically and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and

> attitudes towards labor controversies . . . .

Id. at 242-43, 79 S.Ct. at 778, 3 L.Ed.2d at 781-82 (quoting Garner v. Teamsters, Chauffeurs & Helpers Local 776, 346 U.S. 485, 490, 74 S.Ct. 161, 165-66, 98 L.Ed. 228, 239 (1953)).

When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by section 7 of the NLRA, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that state jurisdiction must yield. Garmon, 359 U.S. at 245, 79 S.Ct. at 780, 3 L.Ed.2d at 783. The U.S. Supreme Court in Belknap, Inc. v. Hale, ___ U.S. ___, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983), in determining whether a state statute or cause of action had been preempted by the NLRA, summarized the two doctrines to be applied, the pertinent one being as

follows: "Under the first, set out in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), state regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the Act. . . ." Belknap, ___ U.S. at ___, 103 S.Ct. at 3177, 77 L.Ed.2d at 806-07 (citation omitted).

There are certain actions excepted from preemption where the doctrine set out in Garmon, does not apply. These exemptions are created in the NLRA by Congress.[2] Other actions excepted from preemption are those activites regulated by the state which are of peripheral

---

2. See, National Labor Relations Act of 1935, §§14 (codified as amended at 29 U.S.C. §164(c)), 301 (codified as amended at 29 U.S.C. §185), 303 (codified as amended at 29 U.S.C. §187).

concern to the NLRA. See, Linn v. United Plant Guard Workers Local 114, 383 U.S. 53, 61, 86 S.Ct. 657, 662, 15 L.Ed.2d 582, 589 (1966) (civil action for malicious libel during organizing campaign not preempted where NLRA provided no remedy); International Association of Machinists v. Gonzales, 356 U.S. 617, 621, 78 S.Ct. 923, 925, 2 L.Ed.2d 1018, 1022 (1958) (civil action by employee for restoration of union status not preempted where NLRA provided no remedy). Cases involving violence, or the actual threat thereof, where the police power of the states to protect the safety of the public is involved are also exempted from preemption. See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 207, 98 S.Ct. 1745, 1762-63, 56 L.Ed.2d 209, 231-32 (1978) (state trespass statutes); UAW v. Russell, 356 U.S. 634, 646, 78 S.Ct. 932,

939, 2 L.Ed.2d 1030, 1039 (1958) (suit for wages lost due to mass picketing and threats of violence); UAW v. Wisconsin Employment Relations Board, 351 U.S. 266, 274, 76 S.Ct. 794, 799, 100 L.Ed. 1162, 1172 (1956) (mass picketing and violence). These cases concerned activity that touched interests so deeply rooted in local feeling and responsibility that, absent compelling congressional direction, the U.S. Supreme Court refused to infer that Congress had deprived the states of the power to act. None of these limited exceptions is presented in the instant case.

We have found no decisions where the discharge of an employee for the filing of a worker's compensation claim has been held to be a violation of the NLRA and therefore conduct that is actually or arguably prohibited or protected by the NLRA. Appellee has referred us to Krispy

Kreme Doughnut Corp., 245 N.L.R.B. 1053 (1979), enforcement denied, 635 F.2d 304 (4th Cir. 1980), as determinative of the issue before us. In Krispy Kreme, however, the NLRB affirmed the administrative law judge's finding that an employer had violated the NLRA when it discharged an employee solely because of the employee's express intention to file a worker's compensation claim. There the NLRB found the employee's activity protected because the matter of worker's compensation benefits arose out of the employment relationship and was a common interest to other employees. Accordingly, the discharge denied access to compensation to an individual employee and, by example, to other employees. Id. at 1062. Even though the same reasoning could apply to the instant case, we cannot hold that the filing of a worker's compensation claim is covered per se by the Act. We agree

with the concurring opinion of NLRB Member Zimmerman in Ohio Brass Co., 261 N.L.R.B. 137 (1982), wherein he states that:

> Filing workers' compensation claims, however, should be distinguished as an implied section 7 right. Such claims do arise out of the employment relationship, and are presumed to be of common interest to other employees, absent evidence of disavowal of concern by employees. The filing of such claims is thus protected by the Act only through a rebuttable presumption that the activity is concerted, and, unlike union activity, it is not covered per se by the Act . . . .

Id. at 139. (Footnote omitted).

The record before us being void of any evidence indicating a disavowal of concern by other Miller Curtain employees, we hold that the conduct at issue is arguably prohibited by the NLRA and hence within the exclusive jurisdiction of the NLRB.

Accordingly, the judgment of the trial court is affirmed.

RUDY ESQUIVEL,

ASSOCIATE JUSTICE

Court of Appeals
Fourth Supreme Judicial District
of Texas
San Antonio

JUDGMENT

Appeal No. 04-83-00435-CV

Amalia RUIZ,
Appellant

v.

MILLER CURTAIN COMPANY, INC.,
Appellee

Appeal from the 57th District Court
of Bexar County

Trial Court No. 82-CI-01808
Honorable Robert R. Murray,
Judge Presiding

JUDGMENT

After hearing this cause and examining the record, the Court finds that the court below committed no reversible error. It is therefore ORDERED that the judgment be AFFIRMED.

It is further ORDERED that Appellant, Amalia Ruiz, and Sureties, Santos Camarillo and Jesus T. Ruiz, pay all costs of appeal and this decision be certified to the trial court.

Entered this 6th day of February, 1985.

NO. 82-CI-01808

AMALIA C. RUIZ,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	57TH JUDICIAL DISTRICT
	§	
MILLER CURTAIN CO., INC.	§	
	§	
	§	
Defendant.	§	BEXAR COUNTY, TEXAS

O R D E R

The Plaintiff alleges in this cause that she was wrongfully discharged from employment by the Defendant because she commenced proceedings under the Texas Worker's Compensation Act for injuries occurring on-the-job. The discharge action complained of by Plaintiff is prohibited by the non-discrimination provisions of Article 8307c, Tex. Rev. Civ. Stat. This cause is now before the Court on Defendant's Motion to Dismiss for Lack of Jurisdiction because the cause of action asserted by Plaintiff is pre-empted by federal labor law. The Court has

concluded, and the parties have stipulated, that there are no material factual disputes concerning this issue and that it is purely a matter of law.

The Court has carefully considered the respective arguments of the parties, the authorities in their briefs, and the entire record and determined that the Plaintiff's cause of action is for violation of a right that is both arguably and actually protected by Section 7 of the National Labor Relations Act, 29 U.S.C. §151, et. seq., and that such discrimination, if true, would both arguably and actually constitute a violation of Section 8 of the Act. Accordingly, this Court concludes that under the Supremacy Clause of the United States Constitution, Article VII, Clause 2, the protection sought to be afforded by Article 8307c with respect to the parties herein is pre-empted by the

National Labor Relations Act. Accordingly, it is

ORDERED that Defendant's Motion to Dismiss for Lack of Jurisdiction is hereby GRANTED and that Plaintiff take nothing by this cause. All costs are assessed against the Plaintiff for which execution may issue if not timely paid.

SIGNED this 14 day of July, 1983, in San Antonio, Texas.

_____

JUDGE PRESIDING

NO. 82-CI-01808

AMALIA C. RUIZ,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	57TH JUDICIAL DISTRICT
	§	
MILLER CURTAIN CO., INC.,	§	
	§	
	§	
Defendant.	§	BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION

To the Honorable Judge of Said Court:

Now comes Miller Curtain Co., Inc., Defendant in the above entitled and numbered cause, and files this its Motion to Dismiss Plaintiff's Original Petition for Lack of Jurisdiction and in support thereof would respectfully show the Court the following:

1. Plaintiff in this cause alleges that her discharge from employment by Defendant was predicated upon her instituting a claim for worker's compensation benefits, in violation of

Article 8307(c), Texas Revised Civil Statutes.

2. Specifically, Plaintiff alleges in paragraph III of her Original Petition:

> Subsequent to Plaintiff's institution of her Worker's Compensation claim Defendant, through the concerted actions of RON MILLER and JULIE VILLAREAL and unknown others, intentionally and maliciously harassed and wrongfully terminated Plaintiff because she had instituted an action or proceeding under worker's compensation law.

3. This Court is without jurisdiction of this cause of action because the conduct complained of has been preempted by the National Labor Relations Act.

4. Attached hereto and incorporated herein for all purposes as Exhibit "A" is the Affidavit of Gerd Miller, President of the Defendant, establishing that the Defendant is an employer engaged in a business affecting interstate commerce

and within the jurisdictional scope of the National Labor Relations Act, as amended.

WHEREFORE, premises considered, Defendant prays that the Court enter an Order dismissing this action for want of jurisdiction and award it all cost of court, including reasonable attorney's fees. Additionally, Defendant prays for such other and further relief, both at law and in equity, to which it may be justly entitled.

Respectfully submitted,

MANITZAS, HARRIS & PADGETT
Incorporated
1100 National Bank of Commerce
Building
San Antonio, Texas 78205
(512) 224-4046

SHELTON E. PADGETT
State Bar No. 15405400

J. TULLOS WELLS
State Bar No. 21146500
Attorneys for Defendant

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was hand delivered to Mr. Rodolfo R. Munoz, Attorney for Plaintiff, 126 Main Plaza, Suite 1, San Antonio, Texas 78205 on this the 8th day of July, 1983.

SHELTON E. PADGETT

NO. 82-CI-01808

AMALIA C. RUIZ,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	57TH JUDICIAL DISTRICT
	§	
MILLER CURTAIN CO., INC.,	§	
	§	
	§	
Defendant.	§	BEXAR COUNTY, TEXAS

AFFIDAVIT OF GERD MILLER

BEFORE ME, the undersigned authority, on this date personally appeared GERD MILLER who upon his oath did depose and state the following:

> My name is Gerd Miller and I am the President of Miller Curtain Co., Inc., the Defendant in Cause No. 82-CI-01808 entitled Amalia C. Ruiz v. Miller Curtain Co., Inc., pending in the 57th Judicial District Court of Bexar County, Texas. I am a co-founder of Miller Curtain Co., and have been President since 1979. In this capacity, I have personal knowledge of the following facts.
>
> Miller Curtain Co., Inc., is engaged in the manufacture of curtains, drapes and bedspreads at 1734 Centennial Avenue, San Antonio, Bexar County, Texas,